

ANSWERS for John Yetts, Trumpeter

To the PETITION of James Marine and others, Trumpeters.



S the State of this Case, both in Point of Fact and Law, was fully explained to your Lordships in the former Papers, when the Interlocutor complained of was pronounced, it may suffice. In answer to this Petition, in so far as it resumes the former Arguments, briefly to notice the Grounds of Law upon which your Lordships proceeded; and in so far as it contains any Thing new, that shall be separately considered.

The Petitioners Claim is, "That the Gratuity, which I received for attending the Countess of Murray's Funerals, should be communicate equally to them as Household-Trumpeters; which Demand they found, *1st*, Upon a Grant from King James, in the 1688, in Favours of the Household-Trumpeters, *2^{dly}*, They support the same by Proof of a pretended Custom."

As to the *First* of these, without resuming the Grant which was formerly read, and is still in the Clerk of Process his Hands, it was observed to your Lordships, and evidently appeared from the Tenor of the Grant, that it was issued with a particular View only to ascertain certain Fees due to these Trumpeters, upon the Creation of every Duke, Marquis, and other dignified Persons, which, tho' in former Times they had enjoyed, were then withheld; and therefore the said Grant declares the Household-Trumpeters Right to these Fees upon every Creation as aforesaid, bygone and in Time coming: And further declares, That the said Fees are to be equally divided amongst the Trumpeters, in Terms of which the Practice ever since has been, that when these Fees become due, every one of the Household-Trumpeters receives his own Proportion, without Regard to the others, in the same Manner as he does his settled Salary as Trumpeter.

As this then was the obvious Intention of the Grant, so Occasion is taken by some general Words, to ratify all former Grants, if ANY BE, "In Favours of the said Trumpeters, with all Fees, Liveries, Casualties, Burials, Liberties, Privileges and Immunities, Ordinary and Extraordinary, as the same were possessed of before, which, if ANY BE, are thereby ratified and confirmed;" which therefore being only a general Ratification of former Grants, if ANY BE, and of such Privilege, &c. as the Trumpeters formerly possessed; it is incumbent on them, when they make a Demand of this Kind, which supposes a Right antecedently constitute, to give Evidence, how and in what Manner that Right is constitute.

In this View it would have been necessary, in the *first* Place, for the Petitioners to show, That by Law or established Practice there are certain Fees exigible by the Household-Trumpeters, on account of Burials of Noblemen, &c. in the same Manner as the like Fees are by the Grant 1688, ascertained on account of Patents of Honour; and the Necessity of this is obvious, because, if by Law there is no Necessity upon any of the Lieges to employ any Trumpeters, whether Household or not, at the Solemnity of Burials, if there are no Fees exigible by these Trumpeters for Burials, whether they happen to be employed or not, as is specially provided by the foresaid Grant, with Respect to the Fees due the said Trumpeters upon the Creation of every Duke, &c. If the Lieges are absolutely at Liberty to bury with Trumpets or not, to employ what Trumpets they please, whether Household or not, and are not limited to any particular Fee, but as Parties can agree; it must be plain, that this Demand now made upon the Respondent to communicate the particular Gratuity he received at the Countess of Murray's Funeral, is without Foundation.

It is therefore necessary, that the Petitioners bring Evidence that their Right is established in the Way and Manner above noticed; and the Respondents may rest upon the Negative that they have no such Right, so long as the same is not made appear: At the same Time he apprehends, that if there is no Law regulating these Matters, either the one Way or the other, it is a Point of natural Liberty, that the Lieges may employ Trumpets or not, as they please; That they are at Liberty to choose what Trumpeter they think proper, and can agree cheapest with, whether Household or not, and that no Demand would be competent to the Household Trumpeters, either against the Employers or Trumpeters so employed, as encroaching upon the Right of the Household-Trumpeters, and running away with their Fees.

(2)

The Petitioners state a Question, "To what Purpose is the Word *Burials* mentioned in their Grant, if there are no Fees or Casualties to which they have Claim on account of these?" To which it is answered, as already observed, That no more was intended by these Words in the foresaid Grant, but in general to ratify all Privileges, Fees and Casualties of whatever Nature, whether of Burials or otherwise, to which the Trumpeters had Right by former Grants, if any were, which therefore requires, that these particular Grants should be produced, or that the Fees acclaimed are due *ex necessitate juris*; for this Reason the Grant 1688 is special as to the Fees payable to the Trumpeters upon every Creation of Duke, Marquis, &c, and appoints the same to be equally divided amongst all the Trumpeters: But as to all other pretended Fees or Casualties, the Grant leaves them in the same Condition as formerly, with a general Ratification; so that the Word *Burials* in the foresaid Grant cannot avail, unless supported by positive Evidence, that such Fees are exigible from the Lieges, whether they bury with Trumpeters or not, and whether they imploy Household-Trumpeters or not.

At the same Time it may be admitted, that of old when more Grandure and Solemnity, and less Decency was usual at Burials of our Nobility than is now practised, the Household-Trumpeters had sometimes Occasion to officiate as such, and thereby had certain Fees which were acclamable. This appears from the Connection, which the Petitioners observe is betwixt Heralds, Pursuivants, and the Household-Trumpeters; of which there are many Instances, particularly in Proclamations, where the Heralds and Household-Trumpeters officiate jointly, with respect to which, only these Household-Trumpeters can in any Degree be subject to the Lion-Office, unless where they have by special Enactments enacted themselves, but which cannot bind their Successors.

In the same Manner it appears from the ancient Books of Heraldry, that the Practice of old was, for our Nobility and principal Men to bury with great Pomp and Solemnity, at which all the Heralds, Pursuivants, and other Officers of that Court, with the Household-Trumpeters, used to be present with the Coat displayed, and other *Insignia* of their Offices, and made up Part of the Procession, after marshalling the Nobility there present, which undoubtedly belonged to the Lyon and his Heralds, on which Occasion 'tis probable, that certain Fees were due to the Household-Trumpeters, as well as to the Heralds and Pursuivants; but as that indecent Ceremony is long ago disused at Burials, and seems properly to fall under the Statute, discharging the high and unnecessary Expence formerly used on these Occasions, so these Household-Trumpeters seem to have no such Claim now a-days; and if at any Burial, any Trumpeter, whether Household or not is imployed, it is *tantum prout*, which can give no Claim to the other Household-Trumpeters.

But in the next Place, admitting this seclusive Privilege of the Household-Trumpeters to be as strongly founded as the Petitioners figure, where is the Law that intitled such of the Household-Trumpeters as do not officiate, to demand a Division with that particular one who serves? The Words of the Grant 1688 are express, with Regard to the Fees payable by Dukes, &c. upon their Creation, that these should be divided equally and proportionally amongst the whole Household-Trumpeters: The Reason of which is obvious, that these Fees are prestable, whether the Household-Trumpeters be imployed or not, and accordingly have been exacted, so that this was a common Casualty of the Office, and fell regularly to be divided: But as to other Perquisites, which are only due upon Service performed; as there is no Law obliging the Lieges to bury with that *Fracas*; as there is no Law nor any Grant requiring these to be communicate by such as officiate to the others who are absent; so it would be highly unreasonable, that what is the Reward of one Man's Labour, should be communicate to others.

To illustrate this, an Example was formerly given by the Respondent, which still seems exceeding applicable to the present Case, that is, of the Heralds, and Herald-painters; these, as a *Collegium*, do claim the seclusive Privilege of painting Escutcheons, illuminating Coats of Arms, officiating at Burials, &c. and yet it was never heard, that when one of these did officiate in any of the above Particulars, the others who were not imployed made any Claim to a Share of what their Brother gain'd, who was imployed. And this Argument is the stronger to the Case in Hand, from the Connection that the Petitioners themselves have shown your Lordships there is betwixt Heralds and Household-Trumpeters; and it matters not, that other Painters, not enter'd with the Herald-office, do controvert this seclusive Privilege in some Particulars, particularly in painting of Escutcheons, because still it shows that neither *ex necessitate juris*, nor by the Opinion and Practice of these, who claim'd the like Privilege, is this Partition requisite.

But what serves to put this Matter beyond all Doubt, and will be much regarded by your Lordships in a Question which depends intirely upon the History of the

the

the Practice in old Times, is the Authority of a Manuscript Book, in the Advocates Library, being an exact and full Description of the Office of Heralds, &c. published by Sir James Balfour in the Reign of King Charles the II. when the Author was himself Lyon King of Arms; who therefore, it will be presumed, had Reason to know the Law in these Particulars, and the outmost Extent of these Privileges: From the Authority of this Book it is, in the *first* Place, observable, that though he treats of Burials, and lays out the Duty of Heralds and Pursevants officiating at these; yet he no where pretends, that the Leiges are at any Time obliged to bury with that Solemnity; but when that is the Case, remarks the Fees acclamable by every Herald, Pursevant, &c. who officiate thereat. *2dly*, and which is directly to the Point in Hand, He expressly affirms, that such Fees are not communicate by those who officiate to the others who do not serve; but that each retains to himself what he gains. The Authority is so special upon this Point, that the Respondents will beg Leave to insert the whole Paragraph in the Author's own Words, taken from the Book, which is at your Lordships Bar to vouch the Excerpt.

"They have, (*says he*) *treating of the Fees due to the Scots King at Arms, and to his Under-officers, Heralds and Pursevants*, from all Noblemen, spiritual and temporal, created, or to be thereafter created, the Fees following, *viz.* of each Duke 1000 l. Marquis 600 l. 13 s. 4 d. Earl 400 l. Lord 266 l. 13 s. 4 d. Archbishop 400 l. Bishop 266 l. 13 s. 4 d. Knight-Baronet and Batchelor 66 l. 13 s. 4 d. all which is equally divided among the Lyon, Heralds and Pursevants, by Cotts, *viz.* to the Lyon four Cotts, to every Herald two Cotts, and to each Pursevant one."

Herein your Lordships will observe, in the *first* Place, the exact Conformity betwixt the Lyon-office and Trumpeters, in dividing the Fees that are due to them *respective*, upon the Creation of every dignified Person, to which they have Right whether they assist at the Ceremony or not; and therefore are divided amongst the whole, by certain determined Proportions; So Sir James Balfour in the above Passage declares with respect to the Lyon-office; and so the Grant in Favours of the Household Trumpeters does likewise enact: But the Difference betwixt these certain established Fees, and such Perquisites as are accidental, and not due *ex necessitate juris*, whether at Burials or otherwise, is likewise plain from the Authority of the same Author, in the following Paragraph.

"At Funerals, (*says our Author*) Obsequies and Interments, they are paid by the Heirs, Executors, and Intrometters with the Defunct's Goods and Gear; and that according as they serve, and are imployed, and agreed with by those having Interest, WHICH SUFFERS NO DIVISION, but what each gains, it belongs of Pro-perty to himself."

Nor will it have any Influence, that in the above Passage Sir James Balfour makes no Mention of the Trumpeters; because, as your Lordships will no doubt have observed, the strong Connection which is betwixt the Lyon-office and the Household Trumpeters, in many Particulars, especially in the Solemnity of Burials, at which they behaved all to officiate when the Ceremony was compleat; and considering the exact Conformity betwixt the two Offices, in the Articles of Fees due upon the Creation of every dignified Person, a Disparity will not easily be presumed in the other Article of Burial-fees; these, in so far as due to the Heralds and Pursevants, are not communicable by those who did officiate with their Brethren who did not, but every Man's Fee was more or less, according as he pacted, and was the proper Reward of his personal Trouble and Attendance; and the same Thing must undoubtedly hold with respect to the like Fees due *ex eadem causa*, to such of the Trumpeters as did likewise officiate at such Burials; and, as above noticed, the Reason of the Difference lies precisely in this, that the *quantum* of the Fees of every Creation is specially determined, and is due to Heralds, Pursevants, and Household Trumpeters, whether officiating or not: And therefore was properly considered as a common Perquisite of their Office, equally divisible, among the whole, and so *in terminis* appointed by the Grant; whereas in Burials, the Fees there given were only due upon Attendance, and other Services, and were more or less, as Parties did agree: So that these being the proper Reward of every Man's personal Labour, no Law or Reason did require, that these should be divided with others who had no Share of the Trouble, and which others at that very Time might perhaps be gaining as great Fees by their Service.

When these Observations are attended to, your Lordships will not think great Stress can be laid upon the pretended Proof adduced in this Process, that the Trumpeters used to communicate amongst themselves the Fees of Burials. There are but two Instances in the Memory of any Man living, preceeding that of the Countess of Murray's, of Burials solemnized with Trumpets, and even at none of these

(4)
these did the Heralds, Pursewards, and Household Trumpeters walk in Procession with their *Insignia* displayed, as was the ancient Ceremony, upon which these Fees were prestable, which can never be sufficient to establish a Custom; especially where the ancient Practice appears to have been directly contrary, as vouched by the Authority of Sir *James Balfour*, who wrote when these Ceremonies were in *viridi observantia*; at least such Division can only have been in Consequence of a private Concert amongst the Household Trumpeters at that Time, which never can bind the Respondents, who was no Party therein, or their Successors in Office.

It remains then only to consider the Import of a Commission in the 1661, in Favours of *Robert Childers*, produced by the Petitioners, and much founded upon; but which is not in the smallest Degree to the present Purpose: So far must be admitted, that this Commission is of a very unusual Strain, and is not to be met with in any other Commission, since the first Institution of these Household Trumpeters; the Design and Purpose of which seems to have been to establish certain Privileges to this *Robert Childers* amongst his Brethren; the Occasion of which, as appears from the Commission itself, was, that in Proclamations, &c. directed by the Lords of the secret Council and Exchequer, which regularly ought to have been execute by the Household Trumpets only, as the King's established Servants, some of the Household Trumpets had been in Use of conducting, and agreeing with other Trumpets upon certain Compositions, to perform these Proclamations, and other Services with them or for them; this Practice is discharged by the foresaid Commission to *Robert Childers* in these Words, "Discharging always all these Our
" ordinary Trumpeters, in conducting or agreeing with any other Trumpeters, or
" giving Way or Tolerance to them, for Service with them, to serve, or have
" Charge in whatsoever Proclamations, or Letters to be direct by Our Lords of
" Secret Council and Exchequer; and that they nowise serve at Funerals, or other
" Parts where Our ordinary Trumpets have Place or Charge, except the said *Robert Childers* be with them, or that they have his Licence or Commission, otherwise that they make Payment to him of an proportional Part of the Benefit they
" gain."

Here then your Lordships will observe, that *Robert Childers* is allowed to conduce and agree with other Trumpeters than the Household Trumpeters, to serve even on such Occasions as did properly belong to the Household Trumpeters only, but that all the other Household Trumpeters are discharged to make any such Agreement upon any Occasion, whether Proclamations, Burials, or others, where the Household Trumpeters had Charge: So that nothing was hereby intended, but a particular Privilege among the said Household Trumpets in Favours of the said *Robert Childers*, and is nowise applicable to the Point in Issue: *First*, Because it does not appear, that the Household Trumpets have any seclusive Privilege at all Burials, whether of Nobility or Gentry, that none other can be employed by the Leiges to blow a Trumpet but them; for which surely there is as little Reason as in the like Privilege claimed by the Herald-painters, that none other can paint Escutcheons but them. *2dly*, It is still less in Point to the second Question, Whether what is gained by one Household Trumpeter, on Account of his Service at Burials, ought to be communicate to the others who did not officiate?

The Household Trumpeters are his Majesty's ordinary Servants, and as such may be intitled to this seclusive Privilege of all Proclamations, &c. issued from his Majesty or his Courts, or perhaps even in Burials of the Royal Family, where that Solemnity was used, but that the same Privilege should be extended against all the Leiges, so as that they should not be at Liberty to imploy any other Trumpeter, is not founded in Reason, as contrary to the Liberty of the Subject, and which is much doubted if it could be constitute by any Grant from his Majesty: But be that as it will, it would still be sufficient that an Household Trumpeter was imployed, and no Law has required the Fees of these to be communicate.

The Respondent is therefore hopeful your Lordships will have no Difficulty in finding, that this Demand which is now made against me by the other Household Trumpeters, is neither founded in Law nor Reason; and will therefore adhere to your former Interlocutor, and refuse the Desire of the Petition. But should your Lordships incline to alter, as is believed you cannot, it would then remain to be determined, How far the Petitioners are obliged to communicate to the Respondent the Fees gained by them at Proclamation of *Hallowmas* Fairs, of which the Respondent got no Share; the Fees of which is as much the Reward of personal Service as the other.

In Respect whereof the Desire of the Petition ought to be refused.

ALEX. LOCKHART.

